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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH, *Petitioners,*

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Norman New Rider, a minor, by his mother and next friend, Wilma Williams; Lloyd Cummings, Jr., a minor, by his parents and next friends, Lloyd and Lillie Cummings; and Kenneth Smith, a minor, by his mother and next friend, Velma Smith,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on May 25, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on May 25, 1973, is not yet reported. The opinion of the District Court for the Northern District of Oklahoma entered on August 11, 1972 is unreported. Both opinions are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 25, 1973.[1] A timely petition for rehearing en banc was denied on June 20, 1973. On July 6, 1973, the Court of Appeals stayed the mandate in these proceedings for a period of 60 days from that date, and the Court of Appeals also ordered that the injunction pending appeal previously granted to petitioners be continued in force and effect for 60 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a school hair length regulation, which prohibits male students from wearing their hair long and in braids, unconstitutionally infringe upon the freedom of expression of male Pawnee Indian students, when male Pawnees have traditionally worn their hair in braids and when the students wish to wear their hair

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[1] The following parties supported the position of the petitioners as amicus curiae: the United States of America; Ute Indian Tribe of the Uintah and Ouray Reservation; Oklahoma Indian Rights Association; and the Colorado Civil Rights Commission.

in braids as an expression of pride in and identity with their racial-cultural heritage?

2. Does a school hair length regulation, which prohibits students from wearing their hair long and in braids, unconstitutionally deny male Pawnee Indian students the equal protection of the laws on the basis of race and culture, when long braided hair has a meaning to Pawnee Indians which is deeply rooted in and totally integrated with the Pawnee Indian culture, and when long braided hair has been the longstanding traditional hairstyle of male Pawnees?

3. Does a school hair length regulation, which prohibits students from wearing their hair long and in braids, unconstitutionally infringe upon the free exercise of religion by male Pawnee Indian students, when the wearing of long hair in braids is an important and integral part of Pawnee religion, when the students wish to wear their hair long and in braids for the specific purpose of adhering to tribal traditions, and when the students are members of a tribal religious dance group in which wearing hair in traditional fashion is an important part of membership?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The pertinent texts of the following provisions are set forth in the Appendix:

United States Constitution, Amendment I

United States Constitution, Amendment XIV

Pawnee School District Dress Code,
Hair Regulation

Pawnee School District Dress Code,
Indian Exception to Hair Regulation

STATEMENT OF THE CASE

Petitioners are three minor male Indian students who are members of the Pawnee Tribe. Respondents are the various members of the school board, the Superintendent of Schools, and the Pawnee Junior High School principal.

On April 24, 1972, petitioners were indefinitely suspended from Pawnee Junior High School, where they were enrolled as seventh grade students, for wearing their hair longer than permitted by the school dress code (I:3, 56).[2] At the time of the suspension, petitioners were in the process of letting their hair grow long enough to braid (I:54). The trial court denied petitioners' requested injunctive relief on August 10, 1972 (I:84-88). Petitioners appealed that decision to the Court of Appeals for the Tenth Circuit, which affirmed the decision of the trial court in an opinion entered on May 25, 1973. *See* Appendix F.

Throughout all proceedings in this case, petitioners have asserted jurisdiction under 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 1331. The injunctive relief sought is predicated upon petitioners' constitutional rights under the first and fourteenth amendments and 42 U.S.C. § 1983. In particular, petitioners assert that their constitutional guarantees of freedom of expression, free exercise of religion, and equal protection of the laws have been abridged by respondents without justification.

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[2] Reference to pages in Record on Appeal to the Tenth Circuit Court of Appeals are abbreviated as follows: (the volume number: the page number), *e.g.*, (I:3, 56) represents Volume I of the Record on Appeal at pages 3 and 56.

Petitioners base their constitutional arguments upon the following facts as established by undisputed evidence in the record.

Long braided hair is a long-standing custom and tradition among the Pawnee Tribe which has racial and cultural significance, particularly in relation to specific tribal dances. *See* Appendix F at 9a. It is symbolic of American Indian cultures and of the Pawnee culture (II:20). Long braided hair has "a much deeper and more specific meaning to American Indian people, to the Pawnee people than it does to non-Indian people" (II:20).

Unlike Judeo-Christian religions, the core of Pawnee theology is the belief that every act must accord with the prescribed order in the universe (II:16-17). *See also* Appendix F at 9a. Hairstyle is of "special importance" in the order (II:17-18). From the viewpoint of Pawnee theology, long braided hair has religious significance because it is a recognized part of the order of life. Indeed, religious dances of the Pawnee require long braided hair. *See* Appendix F at 9a. The petitioners are members of a religious society, in which the traditional hairstyle is an important element (II:115-116). In short, Pawnee religion is highly integrated with most tribal practices and traditions, including hairstyle. *See* Appendix F at 9a, 12a.

Petitioners recognize that most older Pawnees no longer wear their hair in traditional fashion. The record shows that this is due to a now-abandoned policy of the federal government. From about 1860 until approximately 1934, the government affirmatively sought to suppress the traditional tribal ways and to

assimilate American Indians into the general society (II:18-19, 100). Since Indian children were sent to federal boarding schools during most of that period, the policy of suppression was most intensely applied in those schools (II:18-19, 99-100). These sustained attempts to force American Indians to forego their American Indian identity had serious adverse emotional and psychological effects on Indians, especially Indian men (II:19, 63-64, 100).[3]

Federal policy has changed so that individual Indians are now encouraged to practice their customs and traditions, and Indian tribes are encouraged to exercise self-determination: accordingly, the last twenty years have brought a renaissance or rebirth of Indian cultures, including that of the Pawnee (II:20, 65, 100-101). Notwithstanding the period of assimilation, the Pawnee culture and theology has been passed on to the present generation of Pawnees (II:20-21, 65).

Petitioners testified at trial that they wished to wear their hair in braids because of their pride in being Pawnee Indians. *See* Appendix F at 9a. Petitioners also testified that they wished to wear their hair in braids because they wished to adhere to the customs and traditional beliefs of the Pawnee culture (II:49-50, 52-53, 54-56). This testimony was undisputed and petitioners' sincerity was never questioned.

Respondents themselves admitted that a temporary exception to the hair regulation, which permitted male

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[3] One of the boarding school methods of suppressing the customs of American Indian tribes, including the Pawnee, was to cut off the hair of male Indian students. This practice resulted in traumatic experiences for Indian boys (II:18-20, 63-64, 100).

Indians to wear braids, was adopted by them in recognition of Indian tradition (II:82; III:10). The respondents offered very general justifications for the hair length regulation.[4] Respondents admitted that petitioners' traditional hairstyle has never caused any disruption in the school (II:78, 83-84, 91; III:13, 14; I:55).[5]

REASONS FOR ALLOWING THE WRIT

I. This Case Squarely Presents the Court With an Opportunity To Establish a Definition of "Symbolic Speech."

The constitutional protection afforded free expression extends beyond the spoken and written word to communicative conduct, or "symbolic speech." *See Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969).[6] We recognize that, under carefully prescribed circumstances, governmental regulation of "symbolic speech" is permissible. *See United States* v. *O'Brien,* 391 U.S. 367 at 376-377 (1968).

There is, however, a crucial threshold question in this area of first amendment protections. The Court has not yet defined "symbolic speech":

> The Court has, as yet, not established a test for determining at what point conduct becomes so

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[4] Respondents stated that such a regulation provides school spirit, pride, initiative and maturity for the student in the classroom. *See* Appendix F at 11a, 12a, 14a.

[5] Pending the appeal to the Court of Appeals, respondents were enjoined from applying the hair regulations to petitioners. Respondents never moved to vacate that injunction on grounds of changed circumstances.

[6] *See also United States* v. *O'Brien,* 391 U.S. 367 (1968); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); and *Stromberg* v. *California,* 283 U.S. 359 (1931).

> **intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression. [*Cowgill* v. *California,* 396 U.S. 371 (1970), Harlan, J., concurring.]**

This case is a perfect vehicle to define "symbolic speech." As will be seen, the lack of such a definition has left lower courts without sufficient guidelines to proceed in this important first amendment area.

The lack of any established criteria for identifying "symbolic speech" has had a varied effect in the lower federal and state courts. Some courts have failed or refused to analyze the problem and instead have summarily dismissed first amendment claims by reference to this Court's statement in *O'Brien* that not all conduct "can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[7] Other courts have attempted to establish such criteria, but have reached differing conclusions.[8] The result has been extreme inconsistency in the constitutional protection afforded persons who assert that their conduct was in fact "symbolic speech." The magni-

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[7] *See, e.g., Freeman* v. *Flake,* 448 F.2d 258, 260 (10th Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972); *Richards* v. *Thurston,* 424 F.2d 1281, 1283 (1st Cir. 1970); *United States* v. *Ferguson,* 302 F.Supp. 1111, 1113 (N.D. Cal. 1969); and *Scott* v. *Alabama State Board of Education,* 300 F.Supp. 163, 167 (M.D. Ala. 1969).

[8] *Compare, e.g., Paladino* v. *City of Omaha,* 335 F.Supp. 897 (D. Neb. 1972); *Crosson* v. *Silver,* 319 F.Supp. 1084, 1086-1087 (D. Ariz. 1970); and *Jeffers* v. *Yuba City Unified School District,* 319 F.Supp. 368, 371-372 (E.D. Cal. 1970). *See also* the cases cited in the following footnote.

tude of the problem raised here can be seen from the wide variety of recent cases in which the "symbolic speech" issue has been raised.[9]

The Court can resolve the ambiguity by adopting the following two-part test for determining whether conduct is entitled to first amendment protection as "symbolic speech": (1) did the individual intend his conduct to have communicative value; and (2) was the conduct understood by others as communicating the intended idea.[10] The second criterion recognizes the suggestion in *O'Brien* that a mere intent to communicate is not enough. It establishes the further requirement that there be a "recognizable communicative aspect" in the conduct as suggested by Mr. Justice Harlan in *Cowgill* v. *California, supra,* 396 U.S. at 371,[11] and thus gives added guidance to the

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[9] *See, e.g.*, the flag desecration cases, *Goguen* v. *Smith,* 471 F.2d 88, 96-102 (1st Cir. 1972), probable jurisdiction noted, 41 U.S.L.W. 3613, May 22, 1973, and *State* v. *Spence,* 81 Wash.2d 788, 506 P.2d 293, 299-300 (1973); cases involving nude dancing and nudity in theatrical performances, *Southeastern Promotions, Inc.* v. *Conrad,* 341 F.Supp. 465, 474-477 (E.D. Tenn. 1972), and *Paladino* v. *City of Omaha, supra;* cases involving the refusal to pay taxes, *Non-Resident Tax Ass'n.* v. *Municipality of Philadelphia,* 341 F.Supp. 1139, 1145-1147 (D. N.J. 1972), *aff'd,* 406 U.S. 951 (1972); and the "long hair" cases, *Freeman* v. *Flake, supra,* 448 F.2d at 260, and *Richards* v. *Thurston, supra,* 424 F.2d at 1283.

[10] Such a test has been urged by several authorities. *See generally Note, Symbolic Conduct,* 68 COLUM. L. REV. 1091 (1968); and L. Henkin, *The Supreme Court 1967 Term:* On Drawing *Lines* 82 HARV. L. REV. 63, 79-80 (1968). *See Goguen* v. *Smith, supra,* 471 F.2d at 99; and *Crosson* v. *Silver, supra,* 319 F.Supp. at 1086-1087.

[11] *See also California* v. *LaRue,* — U.S. —, 34 L.Ed.2d 342, 351 (1972); and *United States* v. *O'Brien, supra,* 391 U.S. at 376.

courts in their task of separating true symbolic conduct from non-assertive conduct.[12]

The lack of objective standards for defining "symbolic speech" was at the heart of the erroneous ruling below. Left without a test with which to proceed, the Tenth Circuit simply concluded that the traditional hairstyle was "not akin to pure speech." *See* Appendix F at 13a. If the courts below had followed the test suggested above, their conclusions would have been both easy and different. First, the plaintiffs clearly intended their conduct to have communicative value: their uncontradicted testimony was that they wanted to follow the "old traditional ways" and that their hairstyle was "one way of telling people that I am proud [to be an Indian]" (II:52). Similarly, the record is clear on the second aspect of the test, that the conduct was understood by others as communicating the intended idea: the respondent school board itself at one time established an exception to the dress code, permitting Indian boys to wear their hair long and in braids in recognition of American Indian tradition (II:82; III:10).[13]

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[12] *See* Note, *Constitutional Law—High School Authorities and the Long Haired Students: In Quest of an Appropriate Analytical Framework*, 47 TUL. L. REV. 407, 410-411 (1973.

[13] *See also* II:20, 66. The wearing of long braided hair by Indians has been recognized as "a time-honored means of expressing their racial heritage and identity" and, therefore, has received first amendment protection by at least one federal court. *Duro* v. *Valley Center Union School District*, Civil No. 72-224-S (S.D. Cal. 1972). *See also Braxton* v. *Board of Public Instruction of Duval Co., Fla.*, 303 F.Supp. 958 (M.D. Fla. 1969), where a black's wearing of a goatee as "an appropriate expression of his heritage, culture and racial pride" was afforded first amendment protection.

Thus, a simple, objective test for defining "symbolic speech" would have accorded these petitioners the first amendment protection to which they are entitled. The formation of such a test would provide lower federal and state courts with needed guidelines for dealing with the important constitutional area of "symbolic speech."

II. The Facts of This Case Permit This Court To Determine, for the First Time, the Extent to Which the Equal Protection Clause Guarantees to American Indians the Right To Retain Their Cultural and Racial Uniqueness.

The classification established by the hair length regulation at issue here includes all male students in the Pawnee school system. The class affected by the statute, however, is not uniform. The class includes a separately recognizable, well-defined class of persons: male Pawnee Indian students, who abide by a unique racial, cultural and religious practice of wearing long braided hair and who are therefore not similarly situated to other, non-Indian members of the general class established by the regulation.[14]

The inclusion of male Pawnee Indian students within the broad class established by the regulation forces such students to carry a far heavier burden than other, non-Indian members of the class. In particular, petitioners carry the grave burden of choosing between their racial identity, cultural prac-

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[14] The record in this case establishes that the wearing of long braided hair has a "much deeper and more specific meaning" to Pawnee Indians than to non-Indians (II:20); that hair style is inextricably tied to Pawnee Indian racial, cultural and religious practices (II:16-17); and that long braided hair is "symbolic of the American Indian culture and . . . of the Pawnee culture" (II:20).

tices and religious beliefs on the one hand, and their desire and need for an education on the other.

A denial of equal protection has often been found by this Court even where, as here, the state action is even-handed on its face; the rationale is that like treatment of persons not similarly situated can place an unequal burden on some identifiable groups within the classification. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); and *Griffin* v. *Illinois*, 351 U.S. 12 (1956).[15]

Since the discrimination in this case is based upon race, the regulation must be subjected to "the most rigid scrutiny." *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). *See also, e.g., Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); and *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964). The respondents, therefore, should have been required to justify the regulation by a compelling state interest. *See, e.g., Griggs* v. *Duke Power Co., supra; McLaughlin* v. *Florida, supra;* and *Loving* v. *Virginia*, 388 U.S. 1 (1967).

The classification established by the regulation, insofar as it includes the distinct and unique class of male Pawnee Indian students, is unsupported by any compelling state interest.

The Court of Appeals defined respondents' justification for the regulation as "that of instilling pride

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[15] The constitutional impropriety in such "over-inclusive" classifications has been discussed in detail in the excellent Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1086-87 (1969). This Court has cited the article with approval. *See Dandridge* v. *Williams*, 387 U.S. 471, 486 (1970).

and initiative among the students lending to scholarship attainment and high school spirit and morale." *See* Appendix F at 14a. It is apparent, both from the testimony in the record and from the historic Indian experience in American school systems, that respondents failed not only to satisfy the strict scrutiny standard of review, but they failed to establish even a rational relationship between the classification established by the regulation and the stated purpose of the classification, insofar as it applies to petitioners as Pawnees and American Indians.

The petitioners testified that they wished to wear their hair long and in braids in order to follow the tradtional Pawnee ways and to express their pride in being Indian (II:49-50, 52-53, 54-56). In light of this testimony, it is wholly without rational basis to conclude that the application of the school hair length regulation to petitioners could possibly instill in them "pride and initiative . . . lending to scholarship attainment and high school spirit and morale."

Secondly, history has shown that school policies which force Indians to abandon their traditional racial and cultural practices lead to negative educational results. For almost a century, the federal government followed a policy aimed at suppressing Indian traditions and assimilating Indians into the great American "melting pot." [16] An integral part of

[16] In 1969, the Senate subcommittee on Indian education aptly described the effect of this policy on the federal school system for Indians:

> The Bureau of Indian Affairs had started building its boarding schools system in the 1870's, often using abandoned Army posts or barracks as sites. Such schools were run in rigid military fashion, with heavy emphasis on rustic vocational

the "assimilation" policy was to cut off the hair of male Indian students in federal boarding schools. One Indian witness, 64 years of age, described this experience:

> "[W]hen I was a boy, a little fellow, I had long hair . . . [W]hen I went to school [my family] braided my hair . . . When I got to school there, they cut my hair, they cut my hair. They didn't have no clippers them days and just used scissors, put marks all over my head, cut my hair off; and I ran off, went home. My folks didn't know me. I mean, the whole family cried, old folks. All had long hair. That's what they wore." [II:63-64.]

The tragic results of the federal policy are documented in the dismal statistics attesting the low educational achievement of Indian children.[17] The

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education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returniing to his people. [SPECIAL SUBCOMMITTEE ON INDIAN EDUCATION OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S.REP.No. 91-501, 91st Cong., 1st Sess. 12 (1969) (hereinafter cited as S.Rep.No. 501).]

[17] The extensive record of the Senate Subcommittee on Indian education seven volumes of hearings, five committee prints, and S. REP.NO. 501, constitute a major indictment of the failure to provide an effective, quality education for Indian children:

> Drop-out rates are twice the national average in both public and Federal schools. Some school districts have dropout rates approaching 100 percent;
>
> Achievement levels of Indian children are 2 to 3 years below those of white students; and the Indian child falls progressively further behind the longer he stays in school;
>
> Only 1 percent of Indian children in elementary school have Indian teachers or principals;

policy was finally repudiated only recently. However, public schools are faring no better than federal boarding schools in educating the American Indian child:

> Study after study shows Indian children growing up with attitudes and feelings of alienation, hopelessness, powerlessness, rejection, depression, anxiety, estrangement, and frustration. Few studies . . . show the public schools doing anything to change this pattern. The public school becomes a place to leave when he becomes 15 or 16. . . . [T]he Indian child comes to believe "he can only succeed if he were white." [S. REP. No. 501 at 28.]

In sum, historical experience and educational studies support the conclusion that stripped of his traditional customs, the Indian child is in fact stripped of his pride, his initiative, his identity. As stated by Dr. Karl Menninger:

> "Someone has committed a crime in making the Indian feel ashamed of his own heritage. You cannot crush a child's spirit and then expect him

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One fourth of elementary and secondary school teachers—*by their own admission*—would prefer not to teach Indian children; and

Indian children, more than any other minority group, believe themselves to be "below average" in intelligence.

What are the consequences of our educational failure? What happens to an Indian child who is forced to abandon his own pride and future and confront a society in which he has been offered neither a place nor a hope? Our failure to provide an effective education for the American Indian has condemned him to a life of poverty and despair." [S.REPT. No. 501 at IX-X (emphasis in original).]

> to rise up with initiative, pride, and imagination . . . It often seems that Indian children are being deprived of a sense of their own identity." [A. SMITH, INDIAN EDUCATION IN NEW MEXICO 38 (Publications of the Division of Government Research, The Institute for Social Research and Development, The University of New Mexico, No. 77, 1968.)]

Petitioners urge upon this Court a decision which would constitute a judicial milestone long awaited by American Indians who must attend the public schools of this country: that the equal protection clause is applicable to protect the cultural and racial uniqueness of American Indians, and that the state cannot presume irrebutably that a regulation justified as to general application applies equal burdens to Indians and non-Indians alike.

III. This Case Raises for the First Time the Question of the Extent To Which the First Amendment Protects Exercises of a Traditional American Indian Religion.

Based upon their adherence to the beliefs and practices of the traditional Pawnee tribal religion, petitioners assert that their wearing of long braided hair is a religious exercise within the meaning of the first amendment.[18]

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[18] Because the religious beliefs and the daily life of Pawnees are highly integrated, the idea of separateness between the sacred and the secular, as communicated by the word "religion," is not meaningful in the Pawnee culture. Therefore, petitioners' testimony that they wish to wear long hair because they wish to follow the old traditions of the Pawnee, and because they wish to dance the traditional dances indicates the religious significance of long hair in braids in terms which are meaningful to a Pawnee child, given the nature of Pawnee religious beliefs. *See, e.g.*, II:16-18, 49-50, 52, 54-55.

The Court of Appeals properly assumed that the traditional Pawnee religion is a religion under the first amendment.[19] The crucial error of the Court of Appeals was its decision that the wearing of long braided hair is not a religious exercise within the meaning of the first amendment because the Pawnee religion has "no prescribed belief standard" which may be applied to determine whether a particular act is an exercise of that religion within the meaning of the first amendment. *See* Appendix F at 17a.[20] The fear of the Court of Appeals apparently arose from the nature of the Pawnee religion which ascribes to the belief that there is no separation between the sacred and the mundane aspects of life; the propriety of all activities depends upon whether such activities are believed to be in keeping with the harmonic order in the universe. *See* Appendix F at 9a, 12a.

The Court of Appeals understandably did not wish to hold that any and all activities of adherents to the Pawnee religion are constitutionally protected. And

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[19] The facts in the record clearly establish that the traditional Pawnee religion is no less entitled to constitutional status than that of the Amish religion, which is strikingly similar in many aspects to the Pawnee religion. The Pawnee religion like the Amish religion perceives no separation between the sacred and mundane aspects of life; in both religions the religious beliefs pervade and determine the entire way of life; both religions have been in existence for hundreds of years; and both are associated with a cohesive, well-defined group of people. *Compare* Court of Appeals summary of evidence, Appendix F at 9a, and II:16-18 of record on appeal, with *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-218 (1972).

[20] The Court of Appeals found the same constitutional defect to be characteristic of cases concerning religious beliefs of conscientious objectors. *See* Appendix F at 17a.

in perceiving no judicial guidelines to distinguish between those activities of the Pawnee religion which should be entitled to constitutional protection and those which should not, the court simply washed its hands of the question: it held that, where there is "no prescribed belief standard," a court must decline to afford constitutional protection to any practices because to afford protection to one practice would be to mandate, in effect, constitutional protection to all activities of adherents to the tradition. *See* Appendix F at 17a.

Thus, this Court is faced with the unique question of the extent to which the free exercise clause of the first amendment protects practices of a traditional American Indian religion, a religion fundamentally different from the Judeo-Christian religions which the first amendment was designed to protect.

Petitioners suggest that the test which courts should use to determine whether an activity prescribed by the traditional Pawnee religion is entitled to first amendment protection is a balancing of the importance that a particular activity has in the belief structure of the Pawnee religion and the importance of the state's interest in regulating that activity. The importance of a particular practice in a religion based upon oral tradition, as the Pawnee religion, is ascertainable from the testimony of either the Indians themselves or from anthropologists who have studied the way of life of the tribe.

The record in this case abundantly supports the fact that petitioners wear long braided hair because the Pawnee religion places great importance upon that hairstyle as the religiously ordered hairstyle for

Pawnee men[21] (II:16-18; 115-116). If a Pawnee male does not have long braided hair either he is a warrior (II:12) or he is not in accord with the order in the universe and thus threatens to upset all other aspects of that order. Hairstyle, and indeed all aspects of ritual or religious ceremonial dress of the Pawnee, is dictated by the Pawnee's perception of harmonious order in the universe. Long braided hair is the most important part of the ritual Pawnee dress which must be worn to accomplish meaningful ceremonies. *See* Appendix F at 9a; II:18; *see also* II:39.[22]

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[21] The style in which one's hair is worn is of religious importance to other groups. For example, in *Ho Ah Kow* v. *Nunan,* 12 F. Cas. 252 (No. 6, 546) (C.C.D. Cal. 1879), the facts of which are strikingly similar to those in this case, a city ordinance directed that the hair of prisoners be cut to within one inch of the scalp for disciplinary and sanitary reasons. The court held that the ordinance inflicted cruel and unusual punishment on Chinese prisoners because

> it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, *according to their religious faith,* with misfortune and suffering after death. [*Ho Ah Kow* v. *Nunan, supra* at 253 (emphasis added).]

Similarly, Orthodox Jews of the Hassidic Sect wear long sidelocks in literal obediance to Leviticus XIX:27 "Ye shall not round the corners of your heads." 13 ENCYCLOPEDIA JUDICA 270 (1971). The Hassidic Jews believe that the whole universe is part of God's garment and that we must appear and behave in a holy manner because no one can discern the moment when the transformation of the secular into the holy actually occurs. 7 ENCYCLOPEDIA JUDICA 1403-1411 (1971). *See also* S. POLL, THE HASSIDIC COMMUNITY OF WILLIAMSBURG (1962).

[22] Three authorities have squarely ruled that the right of Indian students to wear their hair in traditional fashion is protected by the free exercise clause: *Duro* v. *Valley Center Union School District,* Civil No. 72-224-S (S.D. Cal. 1972); *Michigan Civil Rights*

In summary, it appears that the court below declined to afford the wearing of long braided hair by petitioners constitutional protection as a religious exercise on the ground that the Pawnee religion provides no belief standard which can be applied by a court to determine what activities are religious within the meaning of the first amendment. Petitioners urge that the court below erred in indulging in this judicial washing of hands. The first amendment guarantee of religious freedom prohibits states from unjustifiably regulating, penalizing or discriminating against groups because they hold and practice religious beliefs which may be different from those of mass society. *Cantwell* v. *Conn.*, 310 U.S. 296 (1940); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *People* v. Woody, 61 Cal.2d 716, 394 P.2d 813 (S.C. Cal. 1964).[23]

Commission v. *Dearborn Heights School District No. 7*, Civil No. 205215-R (Cir. Ct. Mich. 1972); the third authority is the Colorado Civil Rights Commission which, after a hearing, concluded as follows *regarding the Pawnee religion:*

> [T]he religious practice and creed of Indians who are active in the religion of their ancestors require that their hair not be cut. This is so, because of the religion's belief that all parts of a person's body are sacred and should not be disturbed or interfered with.

On appeal, the Colorado District Court, in *School District No. 11-J* v. *Howell*, Civil No. C-879 (Colo. 1972), reversed the Commission on the narrow ground that a student can be excluded from school if he refuses to fill out the school's application form, which is necessary to claim the religious exemption. The court did not reverse the finding of the Commission as set forth above. A certified copy of the district court's opinion was filed with the Court of Appeals which took judicial notice of those proceedings.

[23] Federal administrative control of Indian life, until recently, recognized no right of religious freedom for Indians. "Administrators who identified civilization with a particular sect infringed

Petitioners urge this Court to reverse the decision of the court below which, in a case of first impression, has decreed that practices of a traditional American Indian religion are not protected by the first amendment.

CONCLUSION

Throughout the Court of Appeals' opinion runs its interpretation of this Court's opinion in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to the following effect:

> that only by amalgamating children of various races, colors, cultural, ethnical and environmental backgrounds can the public schools become the effective "marketplace of ideas" for the benefit of all students. [*See, e.g.,* Appendix F at 15a.]

Whether such an educational policy is termed "amalgamation", assimilation "or promoting civilization among the aborigines," [24] it has been proven time and time again to be wholly ineffective at best, and totally inhuman at worst. Perhaps the attractiveness of this solution lies in the ease with which it can be

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the religious liberty of the Indians and interfered on the ground of immorality, with many of the dances and other cherished customs of some of the tribes." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 175 (1942 ed.). "On many reservations, native ceremonies were flatly forbidden, regardless of their harmless nature. *In some cases force was used to make the Indians of a reservation cut their hair short.*" THE NEW DAY FOR THE INDIANS; A SURVEY OF THE WORKING OF THE INDIAN REORGANIZATION ACT OF *1934 at 12* (Nash ed. 1938) (emphasis added).

[24] *See* S.REP. No. 501 at 143.

implemented. But as the Senate Subcommittee stated in its report on Indian education:

> There are no quick and easy solutions in this tragic state of affairs; but clearly effective education lies at the heart of any lasting solution. And that education should no longer be one which assumes that cultural differences mean cultural inferiority. [S. REP. No. 501 at X.]

In addition to closing its eyes to the mass of statistics showing the dismal state of Indian education in this country, the Court of Appeals merely scratched the surface of the complex constitutional issues involved in this case and did not even discuss the pertinent cases relied upon most heavily by petitioners: *see Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969); *People* v. *Woody, supra,* and the equal protection cases cited in Section II, above.

In this day and age of mass conformity, petitioner Pawnee Indians urge this Court to repudiate the "amalgamation" theory adopted by the court below and to reaffirm the basic constitutional principles of freedom so vital to the survival of American Indians as a unique people. Petitioners commend to this Court the reasoning in the great opinion of the California Supreme Court in *People* v. *Woody,* 61 Cal.2d 716, 394 P.2d 813 (1964):

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the sub-cultures that flow

> into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the right of the Indians . . . [394 P.2d at 821-22.]

Accordingly, we respectfully submit that this Court should issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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September, 1973

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APPENDIX

A. The United States Constitution, Amendment I

Congress shall make no law . . . respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .

B. The United States Constitution, Amendment XIV

Section 1. No state shall make or enforce any law which shall deny . . . to any person within its jurisdiction the equal protection of the laws. . . .

C. Pawnee School District Code, Hair Regulation (in Material Part) (*See* Appendix F at 8a.)

Hair should have no odd coloring or style. It should be tapered or blocked in the back and cannot touch the shirt collar or ears, and should be one-fourth inch above the eyebrows; sideburns must be no lower than the ear lobe and face clean shaven. . . .

D. Pawnee School District Dress Code, Indian Exception to Hair Regulation (*See* Record of Appeal, Vol. I, Page 118.)

The Board was in general agreement that it would meet their approval if the Indian students were allowed to wear their hair long if they would keep it in braids to comply with the school dress code.

Filed on August 11, 1972

E. District Court for the Northern District of Oklahoma, August 11, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 72-C-146

Norman New Rider, a minor, by his mother and next friend, Wilma Williams: Lloyd Cummings, Jr., a minor, by his parents and next friends, Lloyd and Lillie Cummings: Kenneth Smith, a minor by his mother and next friend, Velma Smith, *Plaintiffs,*

v.

Board of Education of Independent School District No. 1, Pawnee County, Oklahoma whose members are Albert Alley, President, H. L. Ratliff, Frank Maltsberger, Donald Waters, R. L. Woodard: H. L. Holloway as Superintendent of Pawnee School District: James Childers, as Principal of Pawnee Union High School, *Defendants.*

Vincent L. Knight, Oklahoma City, Oklahoma, and Yvonne T. Knight, Boulder, Colorado, Attorneys for Plaintiffs.

Robert J. Scott and William J. Perry, Pawnee, Oklahoma, Attorneys for Defendants.

Memorandum and Order

Memorandum Opinion

Before Luther Bohanon, United States District Judge.

This civil action was brought in this court by the plaintiff minors, Pawnee Indians, by and through their respective parents, as next friend, seeking injunctive relief to prohibit the Board of Education of Independent School District No. 1, Pawnee County, Oklahoma, from depriving

them, under color of law, of their rights and privileges allegedly guaranteed by the Constitution of the United States.

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1343(3) and (4); and Title 28 U.S.C. § 1331.

Plaintiffs allege that this case arises under Title 42 U.S.C. § 1983 and the First, Fifth, and Fourteenth Amendments of the United States Constitution.

The minor plaintiffs were suspended from school by the defendants for violation of the school regulations on the length of hair of male students. The defendant Board had in effect as a part of its dress code for students that male students should not have their hair touch the shirt collar or ears and should be one fourth inch above the eyebrow, that sideburns should be no lower than the ear lobe and that the face should be clean shaven.

Plaintiffs allege in effect that it was a custom and tradition of the Pawnee Indian tribe for males to wear their hair long and in braids and that this was closely tied to tribal cultural identity, tribal customs and traditions and religious identity; that the minor plaintiffs sought to do certain dances peculiar to the Pawnee Tribe of Indians and perform publicly throughout the United States and that it was the custom to wear their hair long in performing these dances. Plaintiffs allege that this custom of wearing their hair long was intended to communicate pride in the culture and tradition of the Pawnee Indians. Plaintiffs further allege that the regulation denies them their fundamental Constitutional rights and that the wearing of long hair has not and will not cause any material or substantial disruption of the legitimate educational processes in the schools of the defendant district.

The minor Indians were suspended from school three weeks before the end of the 1971-72 school term, and under the circumstances then existing, the Court issued a pre-

liminary injunction directing the defendant School Board to refrain from enforcing the school regulation until a final hearing could be held in the case.

The defendant School District contends that its regulations are proper and a legitimate exercise of their power and authority in regulating and controlling the education of the children and their conduct and appearance while in attendance at school; that the Courts should not intervene in resolutions of conflicts which may arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

After the Court entered its Order of May 3, 1972, granting a preliminary injunction, the case came on again before the Court on the 5th day of June for hearing on permanent injunction, and the Court at this hearing found that no substantial Constitutional question cognizable in the federal courts existed and that plaintiffs should seek the remedy in state court, and the case was dismissed for lack of a substantial Constitutional question. Thereafter on June 16, 1972, the plaintiffs filed a Motion for Reconsideration, and the Court vacated its prior Order of Dismissal.

The cause came on for consideration by the Court on the 7th day of August, 1972, upon plaintiffs' request for permanent injunction; and the Court, having heard all of the evidence and having reconsidered the entire case and upon consideration thereof, finds that the defendants' hair dress code requiring male students to conform thereto is not a violation of any of the plaintiffs' rights regarding any religious creed or belief, nor is the enforcement of such code a restriction of any religious belief allegedly held by the plaintiffs, but is at most a restriction upon a religious act. Freedom to act upon a religious belief is not absolute, and the Court further finds that the wearing of long hair to perform the Indian dances, which plaintiffs allege they wish to perform, is not necessary act for any religious, purpose or belief, nor to continue any custom or tradition of the tribe. The Court further finds that the defendants'

conduct and its rules are reasonable and do not discriminate against the plaintiffs on the basis of race, religion or culture.

Finding as I do, the Court is of the opinion and holds that the issue does not turn on the views of a Federal Judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by the male students in the public schools, and a Court should not substitute its social belief concerning the dress code for that of the school board.

The regulation relating to the wearing of long hair is unlike a regulation relating to speech. The most that can be said is that it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas. The First Amendment does not mean that the hair style of a male student in the public schools lies within its protection. *United States* v. *O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672.

Students do not shed their First Amendment rights at the school door, *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. at 506. This does not mean, however, that the Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area. *Freeman* v. *Flake* (10 C.A. 1971) 448 F.2d 258, 261.

The federal courts should not interfere with school regulations controlling the length of hair worn by a male student in a state public school. *Freeman, supra.*

In the last cited case the Court said:

> " * * * The existence of the § 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist 'not in mere form, but in substance, and not in mere assertion, but in essence and effect.' "

The Court in *Freeman, supra,* further said at 262:

> "Whether the allegations of a complaint state a claim for relief is a question of law. *Bell* v. *Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts under the principles stated in *Epperson* v. *Arkansas.*" (393 U.S. 97)

The hair style regulation of the defendant Board is a reasonable limitation placed upon the male student plaintiffs; and it, therefore, does not offend the liberty assurance of the Due Process Clause of the Fifth Amendment.

Therefore, the prayer for injunctive relief should be denied and this case dismissed.

IT IS SO ORDERED.

Dated this 10th day of August, 1972.

LUTHER BOHANON
United States District Judge

Filed May 25, 1973

F. COURT OF APPEALS FOR THE TENTH CIRCUIT, MAY 25, 1973
No. 72-1608

Appeal From the Judgment of the United States District Court for the Northern District of Oklahoma

(D.C. No. 72-C-146)

Yvonne T. Knight, Native American Rights Fund, Boulder, Colorado (Charles F. Wilkinson, Native American Rights Fund, Boulder, Colorado, on the brief), and Vincent L. Knight, Oklahoma City, Oklahoma, for Appellants.

Robert J. Scott, Pawnee, Oklahoma (William J. Perry, Pawnee, Oklahoma, on the brief) for Appellees.

J. Stanley Pettinger, Assistant Attorney General, Department of Justice, Washington, D.C., Carlton R. Stoiber, R. Dennis Ickes, Daniel L. Bell II, for Civil Rights Division, U. S. Department of Justice, Washington, D.C., amicus curiae.

William C. Wantland for Oklahoma Indian Rights Association, Norman, Oklahoma, amicus curiae.

Jeffrey I. Sandman, Assistant Attorney General for Colorado Civil Rights Commission; James F. Reynolds, Director, Denver, Colorado, amicus curiae.

John S. Boyken, John Paul Kennedy for Ute Indian Tribe of the Uintah and Ouray Reservation, Salt Lake City, Utah; Richard H. Bishop, Salt Lake City, Utah, of counsel, amicus curiae.

Before LEWIS and BARRETT, Circuit Judges, and SMITH,* District Judge.

BARRETT, Circuit Judge.

Three minor Pawnee Indian students, by and through their next friends, appeal pursuant to 28 U.S.C.A. § 1291, from the Order of the trial court denying a permanent injunction and dismissing their complaints following a full evidentiary hearing. The appellants are members of the Pawnee Tribe. They were each enrolled as seventh grade students in the Pawnee Junior High School until they were indefinitely suspended on April 24, 1972.

The appellees are members of the Board of Education, the Principal and Superintendent of School District No. 1 of Pawnee County, Oklahoma. It is one school system,

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* Of the Eastern District of Michigan, sitting by designation.

consisting of about 940 students, grades K through 12. There are three main ethnic groups among the students: some 61 percent white, some 33 percent Indian and some 6 percent black.

Jurisdiction is asserted under 28 U.S.C.A. § 1343(3) and (4) and 28 U.S.C.A. § 1331. The injunctive relief sought was predicated on allegations that the hair regulation at issue violated appellants' rights under the First and Fourteenth Amendments and 42 U.S.C.A. § 1983. The appellants contend that their guarantees of freedom of speech, free exercise of religion, equal protection of the law and due process of law were violated. We affirm the summary dismissal entered by the trial court on the ground that there exists no substantial constitutional question cognizable in the federal courts.

The subject hair regulation is part of a school dress code which provides in material part as follows:

> Hair should have no odd coloring or style. It should be tapered or blocked in the back and cannot touch the shirt collar or ears, and should be one-fourth inch above the eyebrows; sideburns must be no lower than the earlobe and face clean shaven . . .

There is no dispute that the hair style of the three appellants violated the regulation.

On May 1, 1972, following a hearing, the trial court issued a preliminary injunction. In ordering the reinstatement of the three appellants, the Court found that the wearing of long braided hair is an expression of a long-standing tradition and heritage of the Pawnee Indians, and that it was a symbol of religious identity. Following a hearing held on June 5, 1972, for issuance of a permanent injunction, the Court reversed its prior findings. It held that no substantial constitutional questions cognizable in

the federal courts existed. It dismissed the complaint. The Court stated that the plaintiffs should seek their remedy in the state courts.

On Motion for Reconsideration filed by plaintiffs-appellants, the lower court conducted a full evidentiary hearing on August 7, 1972. In a detailed Memorandum Opinion dated August 10, 1972, the trial court again found that the school board dress-hair code did not: (a) violate any of the plaintiffs' rights regarding any religious creed or belief, nor is the enforcement of the code a restriction of any religious belief, but 'at most a restriction upon a religious act'; or (b) discriminate against plaintiffs on the basis of race, religion or culture. The trial court also found that wearing of long hair is not akin to pure speech, and that a federal constitutional issue must exist not only in mere form, but in substance, and not in mere assertion, but in essence and effect. We affirm.

Turning now to the record, we summarize, as follows:

(1) For appellants: Certain exhibits in evidence, together with the expert testimony of one Dr. Weltfish, an anthropologist, established that certain Pawnee Indian men and women wore their hair parted in the middle with two braids, one on each side. Dr. Weltfish testified that such long braided hair has racial and cultural significance to the Pawnees, particularly in relation to specific dances; further, she testified that from the viewpoint of Pawnee theology the long braided hair has religious significance in that the Pawnees believed that the universe was created in terms of the cosmos and that the cosmos dictated the nature of the whole social, human, animal, vegetable and material order. She testified that the core of this theological belief is that everything the Pawnee does each day *has religious significance*. She stated that there were certain dances which required long braided hair. She acknowledged that in her book entitled "The Lost Universe" she

did not refer to the Pawnee long braided hair in the sense of any religious significance. She did acknowledge that none of the Pawnee warriors wore long, braided hair, but rather roaches or a hair ridge standing up along the middle. On cross-examination she opined that other authors had not carefully noted Pawnee heritage and tradition in relation to hair styles and their significance.

The appellants, New Rider, Smith and Cummings, testified that they wished to wear their hair in long braids because of their pride in being Pawnee Indians. One Terry Williams, age 21, testified that the hair must be at least 6 or 7 inches long before one can start to braid it. On cross-examination, he testified that until eight or ten years ago the Indian dancers *did not* wear their hair long. On re-direct he stated that more of the young Indians are wearing long braided hair because of a renewed pride in their heritage. Sidney Moore, Sr., age 69, organized an Indian Dance Troupe which has travelled extensively. He learned the entertainment business from his participation with Buffalo Bill's Troupe. When he was a boy he wore long braided hair, but had to cut it off when he went to the Government boarding school. He referred to such hair style as the "old traditional ways." He sees a resurgence among the young Indian people to "regain their tradition, to learn their culture." He acknowledged that long braided hair is important to the dancing troupe insofar as making a living because "we have to wear our hair long in order to be recognized as Indians in a public place where we perform."

(2) For appellees: Leroy Holloway, Superintendent of Schools at Pawnee, stated that Rules and Regulations for students are necessary "to create an environment of learning" and that with only 47 teachers for 940 students, there must be "some kind of discipline code" including the dress code which incorporates the hair regulation. He

opined that the dress-hair regulation here challenged provides school spirit, pride, and maturity for the student in the classrooms; he said that the regulation was initiated by the students in order to instill pride in their school and to create school spirit, without any intent to stifle speech. He testified that disagreement is encouraged. He stated that when the code was first adopted the Board allowed one exception at the specific request of Mrs. Cummings on behalf of her son which was thereafter revoked; and that the Board granted Mrs. Cummings a hearing following revocation, at which time she was accompanied by one John Trudell who remarked that the school and the town would be on its knees before "he left town." He also testified that the Cummings family was the only family which had requested the exception and that when the Board granted it to the Cummings boy it did so with the understanding that his hair would not be permitted to grow longer during the school term.

Jim Childers, Junior High School principal, testified for the appellees that the challenged dress-hair code was in effect during the entire school term 1971-1972. Copies of all school regulations were supplied each student who in turn was asked to discuss them fully with their teachers. On each Monday the teachers were to submit to Childers the names of students who violated school regulations. None of the three Pawnee students here involved violated the hair code until about six weeks prior to termination of the third semester. Childers then spoke personally to each of them and afforded each three weeks to comply before he suspended them. He testified that he often enforced the hair code in relation to white students, without any problems. After the Court entered the temporary restraining order and the three plaintiffs were reinstated, Mrs. Cummings again informed Childers that her son was being abused. However, she did not give Childers any reasons.

Dr. Muriel Wright, Editor of the Chronicle of Oklahoma, Assistant Editor of the Oklahoma Historical Society since 1943, and Editor since 1965, and author of the book entitled "A Guide to the Indian Tribes of Oklahoma" relating to some 67 tribes, including the Pawnee Indians, testified for the appellees. She stated that there was no tradition or custom among the Pawnee Tribes relating to wearing their hair in long braided style, although she did acknowledge that some did in fact do so. She acknowledged that Pawnee culture and religion is highly integrated with most of the tribal practices and traditions.

Marvin Stokes, Superintendent of Schools at Byng, Oklahoma, who served 34 years either as principal or superintendent, testified for the appellees that the school system there consists of 17 percent Indian students, 15 percent Negro students, and the balance whites or Mexicans, some 1,500 students in all. He testified that Byng has a dress-hair code regulation in effect almost identical to the challenged regulation at issue here and that, in his opinion, there is a distinct relationship between its compliance and scholarship attainments of the students. He testified that schools in the area of Byng without such regulations do not attain the high scholarship attributable to the Byng school system. He also testified that the regulation instills pride and initiative among the students and that those students who are not well-groomed generally create trouble. Of particular interest, he testified that *it would be practically impossible to enact a dress-hair code for different ethnic groups within a school system which would not create a disruptive atmosphere.* While recognizing that there are different ethnic and racial cultures, he stated that the integrated school system cannot countenance *different groups* and remain *one* organization.

Appellants contend that our decision in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), cer. denied 405 U.S. 1032 (1972), does not control in the case at bar in light

of fundamentally distinguishable facts bearing upon religious, cultural and racial issues. We did note in that decision—involving, as here, school hair codes— that no claim was made of any racial or religious discrimination. The complaining students in *Freeman* simply wished to express their individualities by wearing their hair so long that they violated the school hair codes. They contended that such expression was guaranteed them under the First Amendment free speech clause. In *Freeman* we held:

> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. 448 F.2d at 261.

We explicitly held that the wearing of long hair is not akin to pure speech. We re-affirm that holding and thus put down any challenge to the subject regulation by the appellants here on a First Amendment free speech basis.

The instant action was filed on April 28, 1972, for injunctive relief. No state court remedy had been sought. We held in Freeman v. Flake, *supra,* that "the remedy provided by § 1983 is supplementary to any pertinent state remedy" and that "a federal constitutional question must exist 'not in mere form, but in substance, and not in mere assertion, but in essence and effect.'" 448 F.2d at 261. While the appellants did not first seek a pertinent state remedy prior to filing this action in the federal district court below as directed by Freeman v. Flake, *supra,* we shall not invoke the doctrine of abstention in light of the passage of time and the attendant need to resolve the issues in dispute.

Our careful review of the record has not disclosed to us any facts which would give rise to a federal court's

duty to entertain the complaints or to afford any relief. Federal courts have the duty to entertain only *solid claims* of constitutional restraints under "color" of state law. Smith v. State of Kansas, 356 F.2d 654 (10th Cir. 1966), cert. denied 389 U.S. 871 (1967). Courts must conduct the "balancing test" referred to in Barker v. Wingo, Warden, 407 U.S. 514 (1972), in avoiding rigidity which would frustrate common sense, even when dealing with constitutional rights. Constitutional rights, including First Amendment rights, are not absolutes. Courts must balance them against a compelling public interest. Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), U. S. appeal pending. We cannot condemn the subject regulation unless it does in fact impinge on the exercise of fundamental constitutional rights or liberties. Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucker, 364 U.S. 479 (1960).

In this case there is neither a fundamental right at issue nor a suspect classification being applied. The hair code regulation bears a rational relationship to a state objective, i.e., that of instilling pride and initiative among the students lending to scholarship attainment and high school spirit and morale. It can hardly be contended from this record that the hair code regulation has ". . . no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . ." United States v. Jackson, 390 U.S. 570, 581 (1968).

We believe that the same rationale applied by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968), which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service Certificates applies here. There the Court rejected the contention that ". . . an apparently limitless variety of conduct [or appearance] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to

express an idea" and held that Government regulation of speech-related conduct is permissible:

> . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 376, 377.

Although no precise formula has been developed, the Courts have held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the states' objectives. McGowan v. Maryland, 366 U.S. 420 (1961).

The very thrust of Brown v. Board of Education, 347 U.S. 483 (1954), was that "education is perhaps the most important function of state and local governments" and that only by amalgamating children of various races, colors, cultural, ethnical and environmental backgrounds can the public schools become the effective "marketplace of ideas" for the benefit of all students. Common sense dictates that some uniform regulations are necessary in order to maintain order, spirit, scholarship, pride and discipline in the operation of such a school system.

In the recent case of San Antonio Independent School District v. Rodriguez, — U.S. — (1973), the Supreme Court held that though education is one of the most important services performed by the State, *it is not within the limited category of rights recognized by the Supreme Court as guaranteed by the Constitution.* Significantly, the Court rejected the "nexus" contentions of the appellees: That

it is the duty of the Court to order equal school district ad valorem tax assessments and to distribute the proceeds realized therefrom equally on a statewide basis in per-pupil expenditures on the ground that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms, and to intelligent utilization of the right to vote. The Court rejected these arguments, reasoning that "the logical limitations on appellees' *nexus theory are difficult to perceive.*" — U.S. at —. (Emphasis ours). The Court declined to condemn the Texas legislative judgment in conferring on political subdivisions the power to tax local property to supply revenues for local purposes, noting "that this Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause," citing to Madden v. Kentucky, 309 U.S. 83 (1940), for the holding that members of a state legislature:

> . . . *enjoy a familiarity with local conditions which this Court cannot have; the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.* 309 U.S. at 88 (Emphasis ours).

That there exists "some inequality" in a school system is not sufficient ground to strike down a whole system, McGowan v. Maryland, *supra,* and it is only where state action impinges on the exercise of fundamental constitutional rights or liberties that the court may interfere with its dedication to local control of education. Dunn v. Blumstein, *supra;* Shelton v. Tucker, *supra.*

There is nothing inherently "suspect", in a constitutional sense, in the subject dress-hair code regulation. It was not promulgated on the basis of race as condemned in Brown v. Board of Education, *supra,* or upon national

origin as condemned by Oyama v. California, 332 U.S. 633 (1948), or upon alienage as condemned in Graham v. Richardson, 403 U.S. 365 (1971), or upon indigency as condemned in Griffin v. Illinois, 351 U.S. 12 (1956), or upon illegitimacy as condemned in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

We believe that we would create a veritable quagmire for school boards, administrators, and teacher personnel, to attempt to wade through in their promulgation and enforcement of dress-hair codes which they may deem necessary to accomplish the objectives we have previously referred to, were we to hold that the subject dress-hair regulation implicates basic constitutional values. We need only ponder — without deciding — what exceptions beyond those urged here might be constitutionally mandated upon the appellees should the appellants prevail here. For example, from a strict Equal Protection approach, we might ask how a school board could draft a dress-hair regulation — or for that matter other such allied regulations — which would not impinge upon or interfere with a personal held belief that is sincere and meaningful in the life of its possessor (a student), parallel to that filled by the orthodox belief in God. We are, of course, referring to religiously held beliefs of conscientious objectors. See United States v. Seeger, 380 U.S. 163 (1965); Polsky v. Wetherill, 455 F.2d 960 (10th Cir. 1972); United States ex rel Donham v. Resor, 436 F.2d 751 (2nd Cir. 1971); Bates v. Commander, First Coast Guard District, 413 F.2d 475 (1st Cir. 1969). No prescribed "belief" standard applies in such cases. The central core or theme is one of personal sincerity and belief. We shall not assume the responsibility of undermining the operations of the public school system by the various states through their duly chosen school authorities on such tenuous grounds. The judiciary is not designed to operate and manage school systems.

AFFIRMED.

LEWIS, Chief Judge, concurring in the result.

I concur in the result but do not consider the case to present the complexities that my Brother Barrett's opinion would seem to indicate and thus find it unnecessary, and undesirable, to give approval to some of the views and statements contained in the main opinion.

The plaintiffs here attack the subject hair code as violative of their right to free speech, due process, and as discriminatory to their race and religion. In Freeman v. Flake, 448 F.2d 258, we held that no substantial federal question was present, per se, in a school hair code such as the one here considered. *Freeman* is controlling and need not be re-examined to support affirmance. Plaintiffs, however, make the additional contention, not considered in *Freeman,* that this particular code is discriminatively oriented as to race and religion. The record simply does not support these claims. More than two-thirds of the students affected by the code are white and the impact of the regulation is not unique to the Pawnee students. Nor is the code religiously oppressive to the Pawnee in a judicially recognizable manner. The Pawnee are near-pantheists, their every act having religious significance in their basic desire to live in harmony with the Universe. Hair styles, as the trial court correctly recognized, have traditional but variable significance to the Pawnee according to the trend of modern custom or a desire to renew or popularize the style of their forefathers. Their present contention of religious oppression rises no higher under this record than a desire to express pride in their heritage through wearing long braided hair. Their desire so to do is understandable but not a constitutionally protected right.

G. Court of Appeals for the Tenth Circuit, June 20, 1973: Order Denying Petition for Rehearing En Banc

Filed: June 20, 1973
No. 72-1608

Order

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis and Barrett, and District Judge Smith, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/ Howard K. Phillips
Howark K. Phillips
Clerk

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-459

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH,
Petitioners,

vs.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition For Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH,
Petitioners,

vs.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions delivered by the Courts below are not yet officially reported, but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Is the wearing of long hair in public schools by Petitioners, contrary to a school dress code containing hair length regulations, applicable to all students alike regardless of race, a constitutionally protected right under Freedom of Speech or Expression?

2. Is a school dress code, containing hair length regulations, which applies to all students alike, regardless of race, a denial of equal protection of the laws?

3. Does the school dress code, containing hair length regulations violate any constitutionally protected Freedom of Religion practiced by Petitioners?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Constitutional provisions and regulations involved are as stated by Petitioners.

STATEMENT OF THE CASE

Petitioners, three minor Pawnee Indian Students, were suspended from Pawnee Junior High School for not complying with hair length regulations in the school dress code requested by student representatives (R, II-75) and enforced by respondent School Board through its authorized agents.

Petitioners sought injunctive relief in the United States District Court for the Northern District of Oklahoma which was denied on August 10, 1972. (R, I 84-88)

The Trial Court's decision was affirmed by the Court of Appeals for the Tenth Circuit by an opinion rendered May 25, 1973 (Petitioner's App. F), and Petitioners are seeking review by certiorari. Respondents' Brief in opposition is based upon the following material facts established in the record.

DRESS CODE

"It is a proven fact, in all good school systems, the student body takes pride in their mannerism and appearance each day. There are to be no organizational initiations which require unfavorable dress. (This does not include Beta Club during initiation week and Sady Hawkin's Day.) No student is permitted to wear any unusual clothing to school. We expect you to wear normal dress as it was manufactured to be worn.

Girls acceptable dress: Dresses, skirts, pant dresses, pant skirts, slack suits, and slacks with overblouses. An acceptable pant dress or pant skirt must look like a dress from the front and the back, either with a skirt flap or with a deep enough pleat to appear as a dress and not wide-legged shorts. The same rule for length of regular dresses goes for pant skirts and pant dresses.

Not acceptable: Shorts, cut offs, jeans (blue or otherwise) or any boy style pants (any pair of pants that have an opening in the front and made with pockets in the back is considered "boy style pants"), extreme mini skirts, sweat shirts, T-shirts. Blouses or shirts designed to be worn inside, must be worn in this manner. No odd hair coloring or styles. The length and style of clothing should be in keeping with those generally accepted in the community as being in good taste and should be of appropriate length so as not to embarrass them or others when sitting down.

> **Boys acceptable dress: Jeans, blue or otherwise, colored pants as long as they are in good taste and not to the extreme, shirt tails so designed must be worn inside of pants, socks shall be worn with all types of foot wear.**
>
> **Not acceptable: Cut offs, shorts, sleeveless shirts, sweat shirts, white T-shirts, leather pants, and footwear without socks. *Hair should have no odd coloring or style, It should be tapered or blocked in the back and cannot touch the shirt collar or ears, and should be one-fourth inch above the ear lobe and face clean shaven.".* (Emphasis ours).**

The code provides school spirit, pride and maturity for students in the classroom so that the teaching or subject matter can prevail without disruption. (R, II-74). It also promotes safety in shop areas and in the school's industrial program. (R, II-74). The formal dress code was first adopted three summers ago at the request of student representatives and thereafter formulated by the Student Council, student club officers and school officials. (R, II-75). Prior to this time hair length and dress had been controlled on an individual basis without a formal code. (R, II-75). The exception of braids was permitted in the Fall of 1972 by an administrative decision at the request of Mrs. Cummings, mother of the plaintiff Lloyd Cummings, for a younger son then in the elementary school. (R, II-76). He never attended school without his hair in braids. (R, II-77). The 940 student body is composed of three ethnic groups of which approximately 33% are American Indian. (R, II-77). Only one male child has worn his hair in braids under the exception previously allowed. (R, II-77). Pawnee Indians have not worn their hair long for fifty years or longer. (Defendants Exhibit 7 at R, II-123). A strong support does not exist among the Indian parents for the school

board and the dress code together with its enforcement against all ethnic groups in an equal manner. (Defendant's Exhibit 7 at R, II-123 and R, II-83). The exception of braids for Indian students was eliminated from the dress code after the Trial Court initially dismissed this action because of problems arising over the exception for Indian students just prior to and subsequent to the filing of this action. (R, II-78). Militant Indian Leaders threatened to bring the town and the school to its knees and the exception was becoming a source of controversy among parents and students of all races. (R, II-79, R, II-80 and Defendant's Exhibit 7 at R, II-123).

There was also an indication to school officials of a desire on the part of the Indian students that they did not wish to have an exception made in the rules for their race. (R, II-79, R, II-80, R, II-81 and Defendant's Exhibit 7 at R, II-123). The violation of the code by the plaintiffs resulted in their suspension from school for the balance of the spring term of the school year of 1971-1972, and was not an indefinite suspension.

Dr. Muriel H. Wright, Editor of Chronicles of Oklahoma, the Oklahoma Historical Society's publication and author of "A Guide To The Indian Tribes of Oklahoma", testified she was familiar with the custom and tradition of the Pawnee Indians and there was no tradition or custom among male members of the tribe to wear their hair long and in braids. (R, II-94). In addition she exhibited copies of portraits of Pawnee Indians painted in the early 1820's by Charles Bird King, one of the great portrait painters of Indians who came to Washington during that period, which were introduced into evidence. (R, II-94, and Defendant's Exhibit 5 and 6 at R, II-121 and 122). An examination of these Exhibits will show that in the 1820's the Pawnee hair style was a roach or scalp

lock, the style in which the hair was cut close to the head except for a narrow ridge from the forehead to the crown. In addition, the cover picture and the picture on page 254 of "The American Heritage Book of Indians" was introduced into evidence as Defendant's Exhibit 3. The cover picture is of Pawnees painted by Charles Bird King during the same period showing their hair style and the portrait shown on page 254 of Defendant's Exhibit 3 is a painting by the early frontier painter, Stephen Long, of a Council meeting of Pawnees held in the 1820's, neither of which indicate a tradition of hair style as being long, parted in the middle and braided on each side, but instead the roach or scalp lock style is shown. (Defendant's Exhibit 3, cover picture and portrait of Council on page 254). Also, the American Handbook of Indians, 1906 Edition, mades reference to contact in the 1540's by Coronado with a Pawnee Indian by the name of "Turk" and Pawnee Indians under Chief Tatarrax, "all naked, with bows and some sort of thing on their heads", which was admitted not to be long hair and braids but the roach. (R, II-28).

Dr. Weltfish, called by the Plaintiffs as their witness, first stated on direct examination as follows:

> Q. Now, Dr. Weltfish, what was the traditional, ordinary everyday hair style of the Pawnee Indian people?
>
> A. There is no question that both men and women wore their hair parted in the middle with two braids, one on each side. (R, II-11).

Later she attempted to qualify the statement by stating that the roach was only worn by warriors during time of war. Dr. Weltfish also admitted that in her book, "The Lost Universe", about the Pawnee Indians, that she

made no reference to the traditional hair style of long, parted in the middle and braids on each side except for warriors in time of war, but instead admitted the text stated as follows:

> "The women's hair style was relatively uniform. It was parted in the middle and made into two braids, hanging down the shoulder in the front. The men's hair styles were more elaborate and varied. A great many of the men wore roaches, a ridge of hair standing up along the middle." (R, II-29 and 30).

The plaintiffs, according to the transcript, wish to wear their hair long (1) to perform Indian dances, (2) because it looks good on Indians, (3) because it is traditional style for Pawnee people and (4) to show pride in being an Indian. None wanted to wear their hair long for any religious purpose. (R, II-48 through 51, R, II-51 through 53, and R, II-53 through 57).

Dr. Weltfish admitted on cross-examination that she had sections in "The Lost Universe", her book about the Pawnee Indians, on dance ceremonies and religious or ceremonial celebrations, but made no mention in the text of the significance of wearing hair long and in braids. (R, II-29 and 40). The religious significance to which she had reference is that any act in which a Pawnee child desired to engage would have religious significance since everything was of religious significance. (R, II-41). She also admitted that Alice Fletcher, following the opinions of John Dunbar who wrote of the Pawnee Indians in 1840, wrote in the Handbook of American Indians that "Many tribes had a distinctive mode of cutting and dressing the hair, and the style occasionally suggested the nickname by which the people were called by other tribes, as, for instance, in the case of the Pawnee, who cut the hair

close to the head, except for a ridge from the forehad to the crown where the scalp-lock was parted off in circles, stiffened with fat and paint, made to stand erect, and curved like a horn, hence the name 'Pawnee' derived from 'pariki', horn." (R, II-23 and 25). Admittedly, she disagreed with the speculation of the derivation of the name, but admitted these early writers that had been with the tribe observed such a hair style to cause them to pursue such reasoning as a source for the name. (R, II-26).

It would be practically impossible to enact a dress-hair code for different ethnic groups within a school system which would not create a disruptive atmosphere. (R, II-105).

Further, the Trial Court found the regulation, unlike a regulation relating to speech, did not infringe upon any religious belief held by Plaintiffs, nor did the regulation discriminate against Plaintiffs on the basis of race, religion or culture. (R, I 86-87).

The Tenth Circuit decision affirmed the Trial Court.

ARGUMENT

The wearing of long hair in public schools should be subject to regulation by school authorities without infringing upon free speech or expression.

The wearing of long hair in public schools is not an exercise of Freedom of Speech. In *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir. 1971), cert. den., 405 U.S. 1032, 92 S. Ct. 1292, 31 L.Ed. 2d 289 (1972), the Court of Appeals for the Tenth Circuit stated:

> "The wearing of long hair is not akin to pure speech, at most it is symbolic, indicative of ex-

> pression of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card case, *U.S.* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672: 20 L.Ed.2d 672:
>
> > 'We cannot accept the views that an apparently limitedless variety of conduct can be labeled 'speech' whenever the person engaged in the conduct intends thereby to express an idea'."

When "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the "non-speech" element can justify incidental limitations on first amendment freedoms, and a governmental regulation is sufficiently justified if it is within the constitutional power of government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged first amendment freedom is no greater than is essential to the furtherance of that interest. *United States* v. *O'Brien* [*1968*], 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, reh. den. 393 U.S. 900, 21 L.Ed.2d 188, 89 S.Ct. 63. See also *Right of Free Speech*, 21 L.Ed.2d 976 at 1005.

In the instant case the Indian children stated they desired to wear their hair long (1) to perform Indian dances, (2) because it looks good on Indians, (3) because it is traditional style of Pawnee people and (4) it is one manner to show they are proud to be Indians. Being in a dance band is not sufficient justification. (See *Ferrell* v. *Dallas Ind. School Dist.* (CA 5 Tex.) 392 F.2d 697, cert. den. 393 U.S. 856, 21 L.Ed.2d 125, 89 S.Ct. 98), and the

Trial Court disposed of the latter three reasons (R, I, 86-87). *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), relied upon by Petitioners is clearly distinguishable in that this Court stated:

> "The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style or department,"

but involved direct, primary First Amendment rights akin to "Pure Speech".

Petitioners urge the Court to adopt a two-part test to determine whether conduct is entitled to First Amendment protection as "symbolic speech": (1) Did the individual intend his conduct to have communicative value -- this is obviously met in *United States* v. *O'Brien*, 391 U.S. 367, supra, where O'Brien burned his Selective Service Registration Certificate publicly, intending to influence others to adopt his anti-war beliefs; (2) was the conduct understood by others as communicating the intended idea -- again this would be met in O'Brien inview of the fact that it was accomplished in a crowd of people, with F.B.I. agents present, although the agents knew at the time only that small white cards were being burned. Especially would this second step be met in view of the fact that members of the crowd began attacking O'Brien and his companions after the burning. If such did not communicate the intended idea, it would be difficult to conceive what else needed to be done to so communicate the idea. When actually applied, it is easy to see that the "two-step test" urged by Petitioners would of necessity require reversal of O'Brien.

It is submitted that if the Court grants certiorari in this matter that the Federal Courts will be deluged with

all manner of symbolic problems and will of necessity, be engaged in the myriad of problems that arise in the day to day operation of the public school systems across the United States. It seems apparent that local governments and school boards should continue to be entrusted with this responsibility.

II. A school dress code containing hair length regulations, which applies to all students alike, does not deny equal protection of the laws.

The regulation bears a rational relationship to a legitimate state objective, i.e., that of instilling pride and initiative among the students leading to scholarship attainment and school spirit and morale.

The instant dress-hair code regulation was not promulgated on the basis of race as condemned in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), upon national origin as condemned by *Oyanna* v. *California* 332 U.S. 633 (1948), upon alienage as condemned in *Graham* v. *Richardson*, 403 U.S. 365 (1971), upon indigency as condemned in *Griffin* v. *Illinois*, 351 U.S. 12 (1956) or upon illegitimacy as condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Rather, the fact that the regulation applies equally to all students in the system is reflected by the record.

The very thrust of *Brown* v. *Board of Education*, supra, was that "Education is perhaps the most important function of State and local governments" and only by amalgamating children of various races, colors, cultures, ethnic and environmental backgrounds can the public schools become the effective marketplace for the benefit of all students. Common sense dictates that some uniform regulations are necessary in the operation of a school system.

Education, though one of the most important functions of the State, is not within the limited category of rights recognized by the Supreme Court as guaranteed by the Constitution (*San Antonio Independent School District* v. *Rodriquez*, (1973), U.S. 36 L.Ed.2d 16, 93 S.Ct.) To warrant condemnation by this Court, the regulation must impinge on the exercise of fundamental constitutional rights or liberties. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

> "By and large, public education in our nation is committed to the control of the State and local authorities" and "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228.

The States, acting through their Courts, should determine what, if any, hair regulation is necessary to the management of their schools. *Freeman* v. *Flake*, supra.

III. The School dress-hair code violates no Freedom of religion practiced by Petitioners. None of the children testified that they wanted to wear their hair long as an exercise of any religious belief, and in fact none testified to their individual beliefs in this regard (R, II 48-51; R, II 51-53; R, II 53-57). Dr. Weltfish, called by Petitioners, after testifying to certain religious significance of long hair (R, II 16-17), admitted that any act that a Pawnee child wanted to engage in, as a form of speech, would have some religious significance in its background, since everything was of a religious significance. (R, II-41). It is submitted that any order of a school board would violate "freedom" of such a religion.

Federal Courts have the duty to entertain only solid claims of constitutional restraints under "color" of State law *Smith* v. *State of Kansas*, 356 F.2d 654 (10th Cir. 1966), cert. den. 389 U.S. 871 (1967), and a federal constitutional question must exist "not in mere form, but in substance, and not in mere assertion, but in essence and effect." *Cuyahoga River Power Co.* v. *Northern Ohio Traction and Light Co.*, 252 U.S. 388, 50 S.Ct. 404, 408, 64 L.Ed. 626.

It is submitted that any claim of restriction upon religious acts is mere form and assertion.

Petitioners claim in the case at bar does not reach the plateau of the circumstances existing in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1973). In that case, the Trial Court noted that the State compulsory attendance law interfered with the freedom of the Defendants to act in accordance with their sincere religious belief. In the instant case nothing of the kind was testified to by Plaintiffs nor were any such findings entered by the Trial Court, although the Court had the power to inquire as to such sincerity and bona fides of any purported religious belief held by Petitioners. *United States* v. *Seeger* 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850.

CONCLUSION

It is submitted that the process of educating children should remain where it has existed, with the State and local governments and that the hair-dress code and its application should be upheld.

As stated by Justice Black, sitting as a Circuit Justice in *Carr* v. *Schmidt*, 401 U.S. 1201, 27 L.Ed.2d 797, 91 S.Ct. 592,

"The only thing about it that borders on the serious to me is the idea that anyone would think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance--the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all of our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear."

Therefore, the Court should not issue a writ of certiorari, or in the alternative, if granted, that the decision entered by the Tenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-459

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor by his mother and next friend, VELMA SMITH,

Petitioners,

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATCLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY, as Superintendent of Pawnee School District; JAMES COLLINGS, as Principal of Pawnee Union High School,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners file this brief in reply to the brief of respondents in opposition to petitioners' petition for writ of certiorari to the United States Court of Ap-

peals for the Tenth Circuit. Petitioners' replies to respondents' arguments follow in the same order as respondents' arguments appear in their brief.

ARGUMENT

I. Respondents' Statement of Facts Shows That There is No Dispute Between the Parties as to Any Essential Facts

There is no dispute between petitioners and respondents as to those facts which are necessary to a determination of the three issues before this Court. Respondents' statement of the case merely supplements petitioners' facts with facts which are not necessary to the decision. For example, it is irrelevant that "Militant Indian Leaders" threatened to bring the town and the school to its knees, and that the exception "was becoming a source of controversy" (Respondents' Brief, p.5), because respondents have admitted throughout all proceedings in this case that there was absolutely no disruption in the classrooms due to petitioners' long hair (I:55; II:78, 83-84, 91; III:13, 14). Similarly, it is irrelevant that some Indian students did not desire the exception for long braids (Respondents' Brief, p.5): this Court is well aware of the principle that the rights of minorities in this nation cannot be predicated upon the whims of the majority.

Secondly, respondents state in their brief that Muriel H. Wright testified that there "was" no tradition or custom among male members of the Pawnee tribe to wear long braided hair (Respondents' Brief, p.5). This is an incorrect statement of Miss Wright's testimony. To the contrary, Miss Wright very pointedly testified that "there *is* no tradition" (II:94, emphasis added). An examination of the record as a

whole shows the importance of the "is"—"was" distinction. Miss Wright, on cross examination, admitted that some older Pawnees still wear long braided hair (II:99-100).[1] Respondent Holloway, the school superintendent, testified that the school board recognized long braided hair as "an Indian tradition" (II:82; III:10). The fact that many Pawnees no longer wear the traditional braided hairstyle is poignantly explained by the record: the uncontradicted testimony is that the specific, intentional policy of the Bureau of Indian Affairs until the 1930's was to strip Pawnees and other American Indians of their traditions, including their traditional hairstyles (II:18, 19, 63-64, 100, 116). Today, modern Pawnees, and other Indians, are undergoing a rebirth of the old traditions, including hairstyle (II:20, 61, 100-101).

Accordingly, the record can be fully and fairly reconciled as follows: (1) Pawnee males traditionally wore their hair in one of two styles, long and braided, or in a roach;[2] (2) most male Pawnees stopped adhering to their traditional hairstyle due to the federal Indian policy of suppression of Native American cultures; (3) today a few old Pawnee men, along

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[1] Defendants also refer to a newspaper article supporting the proposition that Pawnee Indians "have not worn their hair long for 50 years or longer." (Respondents' Brief, p. 4). An indisputable inference from this statement is that Pawnees once wore their hair long. In addition, this statement, which was contained in a newspaper article without factual foundation concerning the expertise of the speaker, is contradicted by several photographs in the record including one—taken in 1949—from the book written by defendants' expert. (II:99)

[2] Petitioners have always admitted that the roach, or scalp lock, is one of the customary hairstyles of the Pawnee male along with the long braided hairstyle.

with an increasing number of younger Pawnees, wear their hair in the old customary style of long braids. Significantly, then, both petitioners and respondents flatly agree that the long braided hairstyle was one of two customary hairstyles among Pawnee males in past years, and that, although the style has declined in recent years, some Pawnee males still practice the custom.

II. A Decision for Petitioners Would Not Require Reversal of United States v. O'Brien Nor Would It Result in a Deluge in the Federal Courts of Symbolic Speech Cases

This Court is not required to overrule *United States* v. *O'Brien,* 391 U.S. 367 (1968), should it decide in favor of petitioners (Respondents' Brief p.10). In *O'Brien*, the Court disposed of the speech issue by holding that, even if O'Brien's conduct constituted "speech", the governmental interests in that case outweighed that First Amendment right. *O'Brien, supra at* 376. The Court was not required to, and did not, reach the question of whether the conduct constituted "speech." Thus, petitioners continue to believe that this Court should grant certiorari to develop a definition of symbolic speech.

Adoption by this Court of the two-part test urged by petitioners[3] will not result in a "deluge" of symbolic speech cases (Respondents' Brief, pp. 10-11). Most of the symbolic speech cases now before the federal courts are there because of confusion among the courts and the bar as to what conduct constitutes

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[3] The two-pronged test suggested by petitioners in their Petition for Certiorari was recently adopted by the Colorado Supreme Court in *People* v. *Vaughan*, No. 25279 (S.C. Colo., October 1, 1973).

symbolic speech. Adoption of a definition of symbolic speech would thus almost certainly clear the courts of many cases because the conduct involved failed to meet the two-part test; this is particularly true in regard to the second part of the test; namely, whether the intended communication was recognized as speech by others.

III. State Action Although Even-Handed on its Face May Deny Equal Protection if a Group of Persons Within the Affected Class is Not Situated Similarly to the Rest of the Class and as a Result Bears a Disproportionate Burden

It is clear from two recent decisions of this Court in *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972), and in *Norwood* v. *Harrison,*——U.S.——, 37 L.Ed.2d 723 (1973), that it is the discriminatory *effect* of state action, not the intent, which is determinative of a violation of the equal protection clause of the United States Constitution. As this Court stated in *Norwood* v. *Harrison*:

> [G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia,* . . . The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal. [37 L.Ed.2d at 732.]

Thus, it is constitutionally irrelevant whether the hair rule is applicable to all students alike. The crucial question is whether the *effect* of the hair rule is discriminatory toward male Pawnee Indians who

wear long braided hair to express their racial, cultural, and religious beliefs. The record in this case shows that petitioners are not situated similiarly to the other male students in Pawnee schools in regard to the significance of long braided hair; therefore, the hair rule—though even-handed on its face and though enacted with the best of intentions—imposes a much heavier burden upon petitioners and thus denies petitioners the equal protection of the law.

IV. Within the Context of the Pawnee Faith, Petitioners Did Express Their Belief that Long Braided Hair Has Religious Importance in the Pawnee Religion

In the traditional Pawnee culture or way of life, those activities which the non-Indian society would classify as religious were in fact indistinguishable to the Pawnee from those activities which non-Indians would classify as secular. The record shows that activity of Pawnee daily life must be carried out in harmony with the Pawnee-perceived order in the universe. To live in harmony with the universal order is the highest sacred goal for every Pawnee. Long braided hair worn by Pawnee males was perceived to be the correct or ordered hairstyle for men in times of peace. This, then, is the sacred or religious significance of long braided hair in Pawnee life (II:16-18; *see also* Petition, App. F at 9a, 12a).

Because the Pawnee culture recognizes no rigid separation between the sacred and the secular, Pawnees—and especially children—cannot be expected to categorize their cultural practices as being either religious or non-religious. Thus, when petitioners stated that they wish to wear long braided hair in order to follow the traditional ways of the

Pawnee, they were communicating their desire to practice an aspect of the Pawnee faith, i.e., the ancient belief that long braided hair has a predesignated and ordered place in the Pawnee concept of the ordered universe.

Neither the trial court nor the appellate court questioned petitioners' assertion that they wore their hair long and braided for religious reasons. With regard to this issue, the appellate court decided that where courts are unable to perceive a conventional belief standard by which to distinguish between religious activities and non-religious activities of a faith, courts must totally refrain from deciding whether a particular activity is within the protection of the First Amendment free exercise clause. Thus, the decisions of the lower courts did not rest upon respondent's argument (Respondents' Brief, p.7, 12, 13) that wearing of long braided hair is not rooted in a sincere religious belief of the Pawnee Tribe.

Finally, respondents suggest that *Wisconsin* v. *Yoder,* 406 U.S. 205 (1973), is fundamentally distinguishable from the case at bar (Respondents' Brief, p.13). To the contrary, the opinion in *Wisconsin* v. *Yoder* is charged with language which shows the direct correlation between the Amish religion and the Pawnee religion. Like the Pawnee religion, the Amish religion "pervades and determines the entire mode of life of its adherents." 406 U.S. at 210. We have emphasized here the fact that this case involves the Pawnee culture and way of life, which is virtually inseparable from the religion; the opinion in *Wisconsin* v. *Yoder* accepts this point by referring repeatedly to the Amish "way of life," as well as to the Amish re-

ligion. *See* 406 U.S. at 209, 210, 211, 215, 216, 217, 218.[4] Both religions "deemphasiz[e] material success, reject the competitive spirit, and seek to isolate themselves from the modern world." *Wisconsin* v. *Yoder, supra,* 406 U.S. at 210. Both are based upon a "devotion to a life in harmony with nature and the soil." *Id.* Both ways of life are "inherently simple and uncomplicated" and in both cases their habits, including "their mode of dress," "set them apart from much of contemporary society." 406 U.S. at 217. Ultimately, the Court granted the protection to proponents of the Amish religion in spite of the fact that "in this context belief and action cannot be neatly confined in logic-tight compartments." 406 U.S. at 220. Precisely the same point applies here: because the Pawnee religion, like the Amish religion, pervades the entire way of life of its adherents, the result cannot be contained in a logic-tight compartment. As this Court recognized in *Yoder,* however, this is not a bar to relief.

Petitioners here seek an alternative remedy to that sought by the Amish in *Wisconsin* v. *Yoder.* Petitioners do not seek to be exempted from attending public school, but rather they seek to be allowed to carry on their Pawnee Indian way of life while attending public

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[4] In spite of this Court's opinion in *Wisconsin* v. *Yoder*, neither lower court was able to accord religious protection to a religion which, unlike the Judeo-Christian heritage, does in fact pervade the entire way of life of the religious sect. This type of reasoning permeates the Court of Appeals majority opinion (*see* especially, Appendix at F-17a) and is particularly visible in the concurring opinion, which, in essence, would deny religious protection because "the Pawnee are near-pantheists, their every act having religious significance in their basic desire to live in harmony with the Universe." Appendix at F-18a.

schools. Petitioners believe that they can be free to adhere to the Pawnee way of life while attending the public schools. Petitioners suggest to the Court that allowing them to retain their unique religious and cultural identity in public school will be a healthy situation for both the petitioners and the school. Petitioners' unique cultural perspective of the world can result in valuable learning experiences in the classrooms and can result ultimately in a much richer total educational experience. The Pawnee culture and religion offer a unique perspective of life; and by that very fact, they can, under the protection of the Constitution, make valuable contributions to the storehouse of ideas upon which this democracy is founded.

CONCLUSION

In the final analysis, the lower courts denied relief here because the facts do not fit into a "logic-tight compartment." Those courts read the Constitution in a purely non-Indian, Judeo-Christian context which supposedly requires so-called "amalgamation." The truth is that the Constitution has alway been flexible enough to protect those small minorities whose beliefs and practices do not fit into a mold cast by the majority. Such is the ultimate lesson to be drawn from cases such as *Wisconsin* v. *Yoder, Tinker* v. *Des Moines Community School District,* and *People* v. *Woody.* This Court should grant certiorari here to establish the principle that the reasonable exercise by Native Americans of their cultural, traditional, and religious values is accorded full protection by the United States Constitution.

Accordingly, petitioners respectfully submit that this Court should issue a Writ of Certiorari to review

the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-459

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH,

Petitioners,

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY, as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

Petitioners hereby request this Court for an order (1) granting rehearing of this Court's order, dated December 10, 1973, denying the Petition for Writ of Certiorari, (2) vacating the order of denial, dated December 10, 1973, and (3) granting the Petition for Writ of Certiorari.

This petition is based upon the ground that it serves to clarify the issues briefed on certiorari and that the issues, as clarified, warrant the granting of certiorari. This Court has recognized that clarification of the original arguments is a proper ground for granting rehearing pursuant to Rule 58(2), RULES OF SUPREME COURT. *See, e.g., Hickman* v. *Taylor,* 328 U.S. 876 (1946), 329 U.S. 495 (1947); *Brinkerhoff-Faris Trust Company* v. *Hill,* 280 U.S. 550 (1930), 281 U.S. 673 (1930).[1] The ground for rehearing and granting of certiorari is that this is an appropriate case for the Court to recognize an implied constitutional right to cultural integrity. A discussion follows.

The briefs in this case, however inadvertently, cast this case as a so-called "long hair" case. The essence of this case, however, is Indian culture, not long hair. It happens that this case involves the traditional Pawnee hairstyle, but this case could easily have arisen in the context of a regulation prohibiting the retention of other equally harmless cultural characteristics, such as language, moccasins, beadwork, squashblossom necklaces, shell belts, or any of the other traditional symbols of the American Indian culture and race.

The cultural, racial, and religious issues involved in this case are difficult to compartmentalize. A large part of this problem is due to the fact that Indian culture and religion existed in this country long before now-magic legal phrases such as "freedom of religion," "equal protection," and "symbolic speech." Because of linguistic and cultural differences, such phrases do

[1] The orders granting rehearings in these cases did not specify the grounds for relief, but the petitions for rehearing in both cases were based upon clarification of the arguments. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 526 (4th ed. 1969).

not always fit perfectly the mores of the literally foreign culture of the American Indian. The issues here, then, are not purely speech, religion, or race—each taken in a vacuum—but rather a mix of all three, plus the fourteenth amendment guarantee of liberty. The issue should have been cast in terms of whether the Constitution protects specific traits of the culture of the American Indian, when the expression of those traits has caused no demonstrable harm. Although it seems so instinctively plain that the Constitution does afford such protection, we recognize that no specific line of cases is directly in point.

The Court can resolve these conceptual problems by recognizing a constitutional right to cultural integrity.

The right to cultural integrity flows naturally from this Court's past decisions and is particularly timely today. As Justice Douglas emphasized in his dissenting opinion in this case, this Court has often held that constitutional requirements of equality do not permit schools "to submerge the individual," *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923), or "to foster a homogeneous people." *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 511 (1969). The lessons of these cases conflict with the broad outlines of *Brown* v. *Board of Education,* 347 U.S. 481 (1954), and the cases following it, if *Brown* is read as requiring a forced "melting pot" or assimilation. This was, we emphasize, precisely the meaning which the Tenth Circuit gave to *Brown* in the decision below. (Petition page 21, Appendix F at 15a.) The tension between the *Meyer-Tinker* and *Brown* lines of authority can be resolved by recognizing a right to cultural integrity. This Court could fashion a test, when such a right is claimed, requiring the claimant to show (1) the

existence of a cohesive, well-defined culture, *cf. Yoder* v. *Wisconsin,* 406 U.S. 205, 215-18 (1972), and (2) that the conduct in question is a specific characteristic of the culture. The entity seeking to infringe upon the right would then have to justify its conduct by showing either a rational basis or a compelling state interest. Such a test would protect important interests such as those involved here, while at the same time limiting the circumstances under which the right could be invoked. The application of such a test to the facts of this case would result in a reversal of the decision of the Tenth Circuit Court of Appeals.

The right suggested here is similar in concept to other implied rights and powers which this Court has often recognized in the past. An intriguingly similar case is *Kent* v. *Dulles,* 357 U.S. 116 (1958), where this Court concluded that the "liberty" guarantee of the fifth amendment included a "right to travel": "where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129. A "freedom of association" results from the free speech and assembly guarantees of the first amendment. *NAACP* v. *Alabama,* 357 U.S. 449 (1958). The "right to privacy" results from the guarantees of the first, third, fourth, fifth, and ninth amendments. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).[2] The right

[2] This Court has found implied powers as well as implied rights. The judiciary's power of judicial review was implied from the Constitution in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803). Congress' power over Indian affairs is now recognized as deriving from the treaty-making power and the commerce clause. *McClanahan* v. *Arizona,* 411 U.S. 164, fn. 7 (1973). *Cf. McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

to cultural integrity flows easily from the first amendment guarantee of freedom of expression and, particularly, from the fifth and fourteenth amendment guarantees of "liberty." The case for such a right is even stronger for American Indians because race and religion are also involved, thus invoking the relevant provisions of the first and fourteenth amendments.

The issue, as phrased in this petition, is in the front line of important matters before this Court. The recognition of a right to cultural integrity will clarify the balance between the right to equal opportunity, as set forth in *Brown* and related cases, and the right to be free of force, unreasonable, and unnecessary assimilation. This case is of great importance to the civil liberties of American Indians, as is shown by the participation of the several amici in the Court of Appeals. Significantly, the United States of America considered this case to be important enough to participate as a vigorous amicus below, although the United States adhered to its practice of not participating on certiorari in cases in which the United States is not a party. In light of a disturbing rash of expulsions of American Indian students all across the country for reasons similar to those raised in this case, we are confident that many other American Indian and civil liberties organizations will seek to participate as amici if this Court decides to hear this case on the merits. The profound impact of these issues on American Indians will be even more apparent then.

In conclusion, the right to cultural integrity suggested here would serve to eliminate one of the greatest sources of inequity and tension in this country. This nation is founded upon the principle of minority rights, as well as upon the principle of majority rule. The balance between the two concepts is a delicate one, and

the court below upset the balance by applying only the notion of majority rule. We recognize and respect the strictures which this Court places upon the granting of petitions for rehearing; nevertheless, such strictures should be outweighed here by the harmless desire of three young boys to practice the long-standing traditions of an old and proud culture. These many forces would be fully and fairly reconciled by this Court's recognition of a right to cultural integrity—a constitutional right which, though implied, is a principle easily derived from our Constitution, which has always been read in a manner to recognize the rights of American Indians, who so often have no ultimate recourse other than to this Court.

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January, 1974

Certificate of Counsel

As one of the attorneys for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that this petition is restricted to the grounds specified in Rule 58(2), RULES OF SUPREME COURT.

/s/
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